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No. 81-2337

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.,
PETITIONERS,

*v.*

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS/CROSS-PETITIONERS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether a state acting in its sovereign capacity in an action to quiet title against the United States to sovereign public trust lands is subject to the twelve-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

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* The petitioners state the question as "[w]hether a state's action to quiet title against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f)." However, the petitioners have phrased the question too broadly. The dispute in this case involves the application of the statute of limitations to a state acting in its sovereign capacity to protect its sovereign public trust lands as opposed to a state acting in a proprietary or other capacity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

The Attorney General of the State of North Dakota, on behalf of the Board of University and School Lands, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. This brief in opposition is submitted pursuant to Rule 22.1 of the United States Supreme Court.

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* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint. See Rule 40.3 of the Rules of this Court.

## STATUTES INVOLVED

1. 28 U.S.C. 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands***.
>
> * * * * * * *
>
> (d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.
>
> * * * * * * *
>
> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

2. 28 U.S.C. 1346(f) provides:

> The district court shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

3. 43 U.S.C. 1311 provides in pertinent part:

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has in and to all said lands, improvements, and natural resources;* * *

## STATEMENT

1. This action was commenced in federal district court October 31, 1978. The complaint filed by the State of North Dakota requested (1) a declaratory judgment that the Little Missouri River was a navigable river and (2) equitable relief enjoining the Secretaries of Interior and Agriculture and their subordinates from exercising the privileges of ownership to the bed of the river on behalf of the United States. The State of North Dakota claimed ownership of the bed based on a belief that the river is navigable. The United States owns certain lands[1]

[1] Nearly all of the federal riparian lands are acquired lands not public domain. The surface estate is managed by the United States Forest Service and the mineral estate is managed by the Bureau of Land Management. These lands were acquired pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010-1012, originally enacted in 1937. There are also substantial amounts of state-owned and privately-owned riparian lands along the Little Missouri River.

that are riparian to the Little Missouri River and apparently asserted ownership of the riverbed under the mistaken belief that the river was not navigable.

On July 10, 1979, the State filed a motion for summary judgment. The petitioners (federal defendants) filed a cross-motion for summary judgment on October 11, 1979. On February 18, 1980, the district court denied both motions and required the State to amend its complaint so as to assert Federal jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute). The State had asserted Federal jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*).[2]

The State did amend its complaint as directed, asserting jurisdiction under 28 U.S.C. 2409a and 1346(f) (federal quiet title statute), however the State still believes that its original assertion of jurisdiction was also proper and correct.[3]

A one-day trial was held. At the trial the State offered evidence that the Little Missouri River was navigable. The petitioners submitted no evidence on the issue of navigability. Instead, the petitioners argued that the twelve-year statute of limitations (28 U.S.C. 2409a(f)) barred the State from the quiet title action. Over the objections of the State, the petitioners offered the testimony of the Bureau of Land Management (BLM) concerning the records kept at the District Office of the BLM in Billings, Montana. In addition, the petitioners offered certain letters that allegedly showed that the State "knew or should

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[2] In requiring the State to amend its complaint, the district court simply concluded that "the complaint does not support this claim of a Federal question." Petition, App. B, p. 15a.

[3] See Respondent's Conditional Cross-petition for Writ of Certiorari.

have known of the claim of the United States" to the Little Missouri River more than twelve years prior to the filing of its complaint. The State disputed the veracity and relevancy of the evidence and disputed the rationale of the petitioners argument.

In its ruling, the district court did not address the petitioners' evidence because the court ruled that the statute of limitations (28 U.S.C. 2409a(f)) contained in the quiet title statute did not apply to the State where it sought to quiet title to its sovereign public trust lands (the beds of navigable lakes and streams). Moreover, the district court declared that the Little Missouri River was a navigable river at statehood,[4] that title to the bed vested in the State of North Dakota at statehood[5] and that the State cannot be defeated in its assertion of title to the bed.[6] The court's judgment decreed that title to the riverbed "is hereby quieted in the State of North Dakota" with the exception of certain portions of the bed that may constitute part of the Fort Berthold Indian Reservation.[7] Finally, the judgment ordered the United States "to cease and desist from exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of of North Dakota.[8]

2. The petitioners appealed and the State filed a cross-appeal. The State's cross-appeal asserted that its original grounds for jurisdiction were proper and correct. The court of appeals, in affirming the district court judgment, ruled that congress waived sovereign immunity for quiet title actions in 28 U.S.C. 2409a.[9] The court of appeals affirmed the district court's find-

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[4] Petition, App. C, p. 21a and Petitioners', App. D, p. 29a.

[5] Petition, App. C, p. 21a.

[6] *Id.* at 25a.

[7] Petition, App. D, p. 29a-30a. The portions of the bed that could potentially constitute Indian lands were excluded in the State's complaint that originated the action.

[8] Petition, App. D, p. 30a.

[9] Petition, App. A, p. 4a.

ing that the Little Missouri River was navigable at the time of North Dakots's statehood.[10] The court of appeals affirmed the district court's ruling that the statute of limitations in the federal quiet title statute (28 U.S.C. 2409a(f)) does not apply to states where the title dispute concerns sovereign public trust land.[11] Due to its disposition of the case the court of appeals did not consider the State's cross-appeal.[12]

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[10] *Id.* at 13a.

[11] *Id.* at 9a.

[12] *Id.*

## REASONS WHY THE WRIT SHOULD BE DENIED

Contrary to the petitioner's (federal defendants) phrasing of the issue, the Eighth Circuit's decision is not as sweeping as the petitioners suggest. Petition, p. 13. The decision does not hold that any statute of limitations not expressly including a state is invalid as against a state. Rather the narrow holding of the decision is that a specific statute of limitation (section 2409a(f) of the Quiet Title Act) does not apply to an action by a state acting in its sovereign capacity to protect its sovereign public trust lands.

### 1. The District Court And Court Of Appeals Properly Found That The Statute Of Limitations[13] Of The Quiet Title Act[14] Does Not Bar A State From Quieting Title To Sovereign Public Trust Lands.

The petitioners (federal defendants) assert that the doctrine of sovereign immunity requires that the United States consent to any suit brought against it. *United States v. Mitchell,* 445 U.S. 535, 538 (1980), quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941). The petitioners further assert that this consent requirement also applies to actions brought by states. *California v. Arizona,* 440 U.S. 59, 61-62 (1979). Petition, p. 7. The State of North Dakota, in amending its original complaint, does not challenge the doctrine of sovereign immunity. On the contrary, the State brought its action pursuant to the Quiet Title Act which contains a waiver of sovereign immunity by the United States.

a. The petitioners argue that the Eighth Circuit's decision would allow states to reap the benefits of section 2409a consent to suit without abiding by its limitations. Petition, p. 8. The

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[13] 28 U.S.C. 2409a(f).

[14] 28 U.S.C. 2409a.

petitioners further argue that any waiver of sovereign immunity by the United States must be strictly construed. Thus, they conclude that the twelve-year statute of limitations of the Quiet Title Act limits the waiver of sovereign immunity.

As authority the petitioners cite *Soriano v. United States*, 352 U.S. 270, 276 (1957), for the proposition that when the United States consents to be sued, the conditions of its consent "are to be strictly observed and that exceptions to those conditions based on implication are not to be recognized." Petition, p. 7. However, *Soriano* was a suit for money damages against the United States by an individual Phillipine resident under the Tucker Act. *Soriano v. United States*, 352 U.S. at 270-71. This case, on the other hand, involves a claim by a state acting in its sovereign capacity to quiet tile to its sovereign public trust lands. Therefore, the rule *quod nullum tempus occurrit regi* is applicable.

Under the *nullum tempus* rule the defenses of statute of limitations and laches may not be asserted against a sovereign. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938). Further, *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873), this Court ruled that "[s]tatutes of limitations are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Id.* at 70.

Also, this Court has stated as early as 1940 the "waivers by Congress of governmental immunity . . . should be liberally construed" where the federal government is acting in a proprietary status. *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). See also, *National Bank v. Republic of China*, 348 U.S. 356, 359 (1955) ("chilly feeling against sovereign immunity"); *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951) (general trend toward increasing scope of sovereign immunity waiver by the United States). The peti-

tioners leasing of the bed of the Little Missouri River[11] was clearly an exercise of a *proprietary* function while the state's suit is brought in its soveriegn capacity pursuant to the public trust and equal footing doctrines. Compare, *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 101 (9th Cir. 1970) (doctrine of estoppel applies to the government in its proprietary role).

The court of appeals properly noted that "special implications" relating to the applicability of section 2409a(f) exist in this suit since the state is suing in its sovereign capacity, rather than its proprietary capacity, in order to protect its sovereign title interests in public trust land. Petition App. A, p. 5a. The North Dakota Supreme Court has ruled that submerged lands under navigable waters within the state are held in trust for the public. *United Plainsmen Assoc. v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457, 461 (N.D. 1976). See also, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Title to such lands vested in North Dakota absolutely and without reservation upon North Dakota's admission to the Union under the equal footing doctrine. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-71 (1977); *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Weber v. Harbor Commissioners*, 85 U.S. at 65-66. Since this public trust land passed to North Dakota under the equal footing doctrine at the time North Dakota joined the Union, "state title is not subject to defeasance and state law governs subsequent dispositions." *Corvallis*, 429 U.S. at 378. That title to these lands is a basic attribute of state sovereignty was setted in *Pollard's Lessee v. Hagan*, 44 U.S. (3How.) 212, 224-26 (1844), *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1893), and *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903).

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[11] The petitioners conceded that the Little Missouri River is navigable since they have not sought review of this matter in their petition for certiorari.

In *Corvallis*, this Court reaffirmed the constitutional character of the State's title to sovereign lands by stating:

> [U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred *not by Congress but by the Constitution itself*. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the *title thus acquired by the state is absolute so far as any federal principle of land titles is concerned*. For example, in *Weber v. Harbor Commissioners* (citations omitted), the court reaffirmed the doctrine of *Pollard's Lessee*:
>
> > 'Upon the admission of California into the Union upon equal footing with the original states, *absolute property in and dominon and sovereignty over*, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters . . . .' (Emphasis supplied)

*Corvallis*, 429 U.S. at 374 (quoting *Weber v. Harbor Comm'rs.*, 85 U.S. 57 at 65-66 (1873). This Court has expressly recognized that sovereign state trust lands have a fundamentally different character than lands merely held by a state or the Federal government in their proprietary capacity. *Illinois Central Railroad v. Illinois*, 146 U.S. at 452-54 (1892).

Congress, by enacting the Submerged Lands Act of 1953, 43 U.S.C. 1301, *et seq.*, confirmed the state's title to the beds of inland navigable waters. *Corvallis*, 429 U.S. at 371 n.4.[16] The

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[16] In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court stated that "[the Submerged Lands] Act merely confirmed the states' preexisting rights in the beds of the navigable waterways within their boundaries by, in effect, quit claiming all federal claims thereto." *Id.* at 318. In *California ex rel. State Lands Commission v.*

Submerged Lands Act quit claimed all "right, title, and interests of the United States" in such land to the respective states. 43 U.S.C. 1311(b). The application of section 2409a(f) of the Quiet Title Act against a state seeking to protect its public trust lands would, in effect, allow the petitoners to circumvent the provisions of the Submerged Lands Act and nullify the Congressional intent of the Act which expressly disclaimed United States' interests in navigable waters within state boundaries.[11]

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*United States*, 50 U.S.L.W. 4672 (U.S. June 18, 1982) (No. 89, Original), this Court alludes to the proposition that while the Submerged Lands Act *confirmed existing* State title to land underneath inland waters based on the equal footing doctrine, the Act actually *granted* state title to land underlying territorial seas within three miles of state coastal boundaries. 50 U.S.L.W. at 4675. This *granting* of title to coastal submerged land was held to be a constitutional exercise of Congress' power to dispose of federal property. *Alabama v. Texas*, 347 U.S. 272, 273-74 (1954). In *California ex rel. Lands Comm'n* this Court adhered "to the principle that federal *grants* are to be construed strictly in favor of the United States." 50 U.S.L.W. at 4675. Citing *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (emphasis supplied). This principle, however, should have no application to a state seeking to protect its title to sovereign public trust lands within its boundaries. Such lands were not *granted* by Congress to the states, but rather, under the equal footing doctrine, were vested in the states by the Constitution upon their admission to the Union.

[11] Section 1311(b)(1) states that "[t]he United States releases and relinquishes unto said States . . . all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . ." *Id.*

It is indeed ironic that Congress' avowed purpose in enacting the Submerged Lands Act was to once and for all confirm and establish the rights and claims of the states to the land and resources beneath navigable waters within their boundaries. It was Congress' intention that the "highly developed, experienced, and efficient state organizations" controlling the submerged oil deposits not be destroyed by transferring such resources to the control of a federal bureau. H.R. Rep. No. 80-1778, *reprinted in* 1953 U.S. Code & Cong. Ad. News, 1415, 1435. Yet, once again this suit finds a state and federal bureaus litigating over the control of these same oil and gas resources.

The petitioners in this action are attempting to do indirectly that which they cannot do directly. The petitioners are attempting to defeat the legitimate claim of a sovereign state to its sovereign public trust land by administratively claiming such lands and then denying the state a forum for protecting its rightful title. To allow the petitioners to hide behind this statute of limitations would deny meaning to the Submerged Lands Act, the equal footing doctrine, and the public trust doctrine.[18]

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[18] Arguably, any application of section 2409a(f) to a state or any other individual is unconstitutional because, in reality, section 2409a(f) is nothing more than an adverse possession statute favoring the federal government. As such the statute would be invalid for two reasons. First, any application of section 2409a(f) to bar a private suit against the United States to quiet title to land adversely possessed by the United States would violate the fifth amendment's prohibition on the governmental taking of private property without just compensation. The Constitution requires that when the federal government takes property, it must pay for that property. Therefore, any application of section 2409a(f) which allows federal officials to avoid this requirement would directly conflict with the fifth amendment to the Constitution.

Second, it is incompatible with principles of ethical government for the United States to claim by adverse possession land which it does not own. To acquire title by adverse possession a wrongful act (open notorious trespass) must be committed by the adverse possessor. A government should not be allowed to commit such acts nor should the courts sanction such actions by upholding the validity of a statute of limitations such as section 2409a(f) which is, in reality, an adverse possession statute. This is especially so where a state, acting in its sovereign capacity, is seeking to protect its ownership of public trust lands. Moreover, art. IX, section 9, of the North Dakota Constitution prohibits adverse possession against the State:

> No claim for the occupation, cultivation or improvement of any public lands shall ever be recognized, nor shall such occupation, cultivation or improvement of any public lands ever be used to diminish either directly or indirectly, the purchase price of said lands.

b. The petitioners assert that section 2409a(f) applies even to sovereign states. Therefore, they argue that the district court and court of appeals erroneously held that a statute of limitations "does not run against a sovereign, either state or federal, unless the sovereign is expressly designated . . . ." Petition, p. 8. For the proposition that section 2409a(f) applies to sovereign states the petitioners cite *United States v. Louisiana,* 127 U.S. 182 (1888), *United States v. 422,978 Square Feet of Land, San Francisco,* 445 F.2d 1180 (9th Cir. 1971), and *The People of the State of California v. United States,* 132 F. Supp. 208 (Ct. Cl. 1955). However, all these cases are readily distinguishable from the present action. All three of these cases dealt with state claims for monetary damages under the Tucker Act. Furthermore, none of these cases were brought by a state acting in its sovereign capacity to protect its sovereign public trust lands. As discussed above, state title to sovereign public trust lands is vested in the individual states by the Constitution (equal footing doctrine) and was confirmed by the Submerged Lands Act. Moreover, the public trust doctrine even limits the ability of a state to part with its title to such lands. See, e.g., *Illinois Central Railroad,* 146 U.S. at 452-53.

As the court of appeals noted, this case also creates a conflict between two sovereign immunity doctrines. Petition, App. A, P. 7a. On one side, there is the doctrine that a sovereign (North Dakota) should not be subject to the defenses of statute of limitations and laches unless expressly included. Alternatively, there is the principle that consent to suit by a sovereign (United States) should be strictly construed. *Id.* at p. 7a. In this case the conflict should be resolved in North Dakota's favor. In *Texas v. White,* 74 U.S. (7 Wall.) 700 (1869), this Court stated that "[t]he Constitution in all its provisions looks to an indestructible Union, composed of indestructible States." Id. at 725. Further, the most basic premise of federal-state relations is that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy*

*v. Mitchell*, 269 U.S. 514, 523 (1926). To allow the section 2409a(f) limitation to bar a suit by a state acting in its sovereign capacity would substantially curtail the exercise of its sovereign power over its public trust lands. Therefore, the more appropriate rule of construction to apply concerning section 2409a(f) is the *Weber* rule, 85 U.S. at 70, which states that the defenses of laches and statute of limitations do not apply to a sovereign protecting its sovereign interests unless expressly included within the statute. This is especially true when the other party claiming sovereign immunity is seeking to protect a claim to property in a mere proprietary capacity.

c. The petitioners also assert that the court of appeals erroneously concluded that the absence of references to states in the legislative history shows congressional intent to exclude states from the reach of the limitation provision of the Quiet Title Act. Petition, p. 10-11. Based on *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the petitioners claim that a court should not be free to refuse to give effect to the unambiguous language of a statutory provision limiting the waiver of sovereign immunity simply because the court could find no statement in the legislative history "affirming that the provision means what it says." Petition, p. 10. However, a careful reading of all of section 2409a reveals that the statute is not as unambiguous as the petitioners contend. Subsection 2409a(a) is a general waiver of sovereign immunity by the United States with exceptions as to trust or restricted Indian lands. In the following subsections, however, the focus of the statute is turned from the United States to the party bringing the suit. This shifting of the statute's focus refutes the petitioners' assertion that if section 2409a(f) does not apply to sovereign states then neither should section 2409a(a). Petition, p. 10-11. Based on the organization and seemingly separate focus of the different subsections of the statute it is entirely reasonable that a sovereign state be included

under the general waiver of immunity subsection while it need not be included in other subsections."

In subsections 2409a(b), (c), (d), and (f) references are made to the following: "person," subsection 2409a(b), "plaintiff," subsection 2409a(c), (d), and (f), and "predecessor in interest," subsection 2409a(f). No such references are made in subsection 2409a(a). Therefore, since a logical division occurs between the general waiver of sovereign immunity under subsection 2409a(a) and the specific conditions of the waiver listed in subsections 2409a(b)-(g) and since subsections 2409a(b), (c), (d), and (f) refer to three different parties, it is reasonable that a court should consult the legislative history of the statute in order to determine the application of each separate subsection of the statute.

The legislative history of section 2409a(f), H.R. Rep. No. 92-1559, refers to "persons," "citizens," and "individual citizens" but nowhere does it refer to "states." H.R. Rep. No. 92-1559, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4547-52. In a relevant situation, this Court has stated that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)). Even though these cases involved the construction of statutes, there is no logical reason why this principle should not apply to legislative histories as well. Also, this Court has noted the absence of references to states in a legislative history and has stated that "[w]e can only conclude that this silence on the matter is itself a significant indication of legistative intent . . . ." *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

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" Section 2409a(b) refers to "person" which, in common usage, does not include the sovereign. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). Therefore section 2409a(b) clearly does not include a sovereign state.

Significantly, the Quiet Title legislation itself is the result of a title dispute between a private landowner and the United States. *California v. Arizona,* 440 U.S. at 67, n. 7. Furthermore, as originally drafted section 2409a(a), the sovereign immunity waiver, stated that "[t]he United States may be named a party in any civil action brought by *any person* to quiet title to lands claimed by the United States." 440 U.S. at 67, n. 7 (emphasis supplied). The "any person" phrase was subsequently deleted. The fact that this phrase was deleted evidences Congressional intent to include the states in the waiver of sovereign immunity. Therefore, since section 2409a(f)'s legislative history refers specifically to "persons", the statute of limitations, itself, was intended by Congress to cover only stale claims by private individuals and not sovereign state title claims to public trust lands. This is especially true when the equal footing doctrine and the Submerged Lands Act are included in the analysis.

d. The petitioners state that the reasoning applied in *Weber, supra,* and *United States v. California,* 332 U.S. 19 (1947) (that where "public trust" lands are concerned, a sovereign cannot be barred by laches or statute of limitations from suing to assert title) is not applicable in this suit since the national sovereign is seeking to invoke a statute of limitations defense and not a private individual or foreign sovereign. Petition p. 9. However, the petitioners ignore the capacity of the parties. The sovereign State of North Dakota, based on the equal footing doctrine, public trust doctrine, Submerged Lands Act, and the Constitution, is the party acting in its sovereign capacity (protecting sovereign public trust lands) while the petitionersare fulfilling merely a proprietary function (managing acquired federal land for multiple use). Therefore, the state's claim is not subject to the laches or statute of limitations defenses of any other individual or sovereign.

e. The application of 2409a(f) to bar the State's claim would violate the tenth amendment to the Constitution. The tenth amendment "expressly declares the constitutional policy that

Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975). See also, *Metcalf v. Eddy*, 269 U.S. at 523. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that a congressional exercise of power that would be valid against private individuals is nonetheless invalid if it impairs the sovereignty of the states or infringes upon matters "essential to [the states'] separate and independent existence." *Id.* at 845. As stated in *Usery*:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

*Id.* at 845. A long line of decisions from this Court has clearly and consistently held that a basic attribute of state sovereigty is its title to and dominion over its sovereign lands. Beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842), this Court ruled that title to submerged lands beneath navigable waters were sovereign lands reserved by the original thirteen states when they entered the Union. *Id.* at 410. Three years later this Court held that this same reservation applied under the equal footing doctrine to all states subsequently admitted to the Union. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). See also, *Shively v. Bowlby*, 152 U.S. 1, 49 (1893); *United States v. Mission Rock Company*, 189 U.S. 391, 404 (1903). Title to sovereign state land is of constitutional dimension since it is "conferred not by Congress but by the Constitution itself." *Corvallis*, 429 U.S. at 374. Should section 2409a(f) be applied in this case to bar the state's claim, it would effect a forfeiture of North Dakota's sovereign trust lands and divest the State of sovereign title without a judicial adjudication. This is precisely the kind of federal action impairing basic attributes of sovereign

states that is prohibited by the tenth amendment. See *Hodel v. Virginia Surface Mineral & Reclamation Association,* 452 U.S. 264 (1981); *Federal Energy Regulatory Commission v. Mississippi,* 50 U.S.L.W. 4566 (U.S. June 1, 1982) (No. 80-1749.

There is no statute of limitations for actions by the United States when protecting its sovereign title interests. See 28 U.S.C. 2415(c). Hence the application of section 2409a(f) to actions by the states would critically disadvantage the states in their ability to protect their sovereign lands against competing federal claims. It is undisputed that Congress may impose conditions when it waives sovereign immunity. However, it may not impose condictions to that waiver which violate the Constitution. For example, Congress has specified that suits against the United States based on its waiver of sovereign immunity under section 2409a must be brought in federal district court. 28 U.S.C. 1346(f). This condition, however, violates the jurisdictional grant in Article III, section 2 of the Constitution which permits states to bring original actions in the Supreme Court. This Court, in *California v. Arizona,* 440 U.S. 59 (1979), construed the jurisdictional condition in section 1346(f) so as to allow the states to bring original actions under section 2409a in the Supreme Court despite the contrary wording of section 1346(f). Id. at 66-68. In so construing the jurisdictional condition this Court saved the statute and avoided a confrontation with article III, section 2.[20] Likewise, the Eighth Circuit has properly construed section 2409a(f) in this suit and thus saved the statute of limitations section from a constitutional confrontation.

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[20] In *California v. Arizona* this Court stated that when the constitutionality of a statute is challenged "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 440 U.S. at 66 (citing *Crowell v. Benson,* 285 U.S. 22, 62 (1932)).

**2. No Conflict Exists Between This Eighth Circuit Decision And The Other Circuits Since The Decisions Relied On By The Petitioners Did Not Involve A Sovereign State Seeking To Protect Its Title To Sovereign Public Trust Lands.**

The petitioners (federal defendants) assert that this Eighth Circuit decision conflicts with *United States v. Louisiana, supra,* and with decisions from the Ninth Circuit and Court of Claims. Petition, p. 11. These cases, however, are easily distinguishable from the present case.

*United States v. Louisiana, supra,* involved a monetary claim by the State of Louisiana for five percent of the net proceeds from the sale of federal land by the federal government. 127 U.S. at 182. Moreover, Louisiana's right to the proceeds of the sale did not arise from any sovereign title in Louisiana but rather under a congressional act which was enacted in order to provide swamp land reclamation and road construction funds for the developing states. *Id.* at 182-83. Also, the statute of limitations, Rev. Stat. section 1069 (1887 Ed.) (repealed 1911), applied in *Louisiana* was a general statute limiting the jurisdiction of the Court of Claims.[21] In this case, however, the applicable statute, 28 U.S.C. 2409a, *et seq.*, limits causes of action rather than court jurisdiction to hear those actions.[22] Court of Claims jurisdiction is limited to *claims,* usually monetary damages, against the United States. See 28 U.S.C. 1491. The

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[21] Section 1069 was expressly repealed by the Act of March 3, 1911, ch. 14, section 297, 36 Stat. 1087.

[22] In *Kendall v. United States,* 14 Ct. Cl. 122 (1878), *aff'd,* 107 U.S. 123 (1882), the court found that there was a great difference between section 1069 and other statutes of limitation. The court stated that it was "not aware of any [other] such statute that declares a *demand barred* if not sued on within the prescribed time; but the prescription always applies solely to the right of action thereon." *Id.* at 123 (emphasis in original). Therefore the clear implication is that section 1069 barred *demands,* such as monetary claims, rather than the specific *cause of action* from which the demand arose.

State in the present action is seeking to quiet title to its sovereign public trust lands by enjoining the petitioners from interfering with the State's exercise of its sovereign rights to this land. The State is not litigating a claim for money damages. Therefore, this suit would be outside the jurisdiction of the Court of Claims primarily because an injunction is sought and not because the six-year limitations bar of the present day equivalent of section 1069, 28 U.S.C. 2501, applies. *Louisiana,* therefore, is simply inapposite since no title to sovereign trust land was in dispute nor was the statute of limitations applied to a sovereign state attempting to protect those lands.[23]

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[23] The state's relationship to its trust land is much like the federal government's relationship to the land it holds in trust for the Indians. When the United States (or the Indian Tribes themselves) acts as a trustee in charge of Indian lands, no defense of laches, estoppel, or statute of limitations will bar the government's action. *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 334 (9th Cir. 1956)). *See also, State of New Mexico v. Aamodt,* 537 F.2d 1102, 1110 (10th Cir. 1976). This same principle applies to a state acting in a sovereign capacity as trustee of its public trust lands. However, a statute of limitations is available against the United States for claims brought by the federal government on behalf of an Indian tribe for money damages arising from contract or tort law relating to Indian land. 28 U.S.C. 2415. Under section 2415(b), a suit by the United States to recover monetary damages to Indian trust land is barred if brought more than six years and ninety days after the right of action accrues. *Id. See, Capitan Grande Band of Missouri Indians v. Helix Irrigation District,* 514 F.2d 465, 469 (9th Cir. 1975), *cert. denied,* 423 U.S. 874 (1975). *See also, Oneida Indian Nation of New York State v. County of Oneida,* 434 F. Supp. 527, 543-44 (N.D.N.Y. 1977). The effect of the section 2415 statute of limitations on United States claims directly parallels the effect of section 2501 of the Tucker Act on claims by the individual states. Just as section 2415 bars state federal monetary claims for damages, section 2501 likewise bars stale state monetary claims for damages. Therefore it is not incongruous that one statute of limitation may apply to the state or federal government when suing in one capacity or on a specific claim, while yet another statute of limitation is not applicable due to the nature of the state or federal governments claim, such as a sovereign state's action to quiet title to its public trust lands.

In *People of the State of California v. United States,* 132 F. Supp. 208 (Ct. Cl. 1955), the court stated that the six year statute of limitations under the Tucker Act applied to a state. *Id.* at 211. However, the court's jurisdiction was based on the Tucker Act and this suit, like *Louisiana,* was also brought to recover a monetary claim. Significantly, in *California,* the United States possessed a recorded deed to the land in question. California challenged the validity of the United States' deed based on the principle that the adverse possession doctrine does not apply as against a sovereign state. *Id.* at 210. California did not, however, challenge the validity of the statute of limitations as applied to the State. In the present suit, on the other hand, North Dakota seeks to quiet title to its sovereign land rather than press a claim for monetary damages. Also, no deed exists in the present case showing any color of title in the United States.

Finally, the petitioners assert that the Ninth Circuit decision in *Park County, Montana v. United States,* 626 F.2d 718 (9th Cir. 1980), is at odds with this Eighth Circuit decision. Petition, p. 12. In *Park County* the district court and court of appeals agreed that the county had failed to show that it enjoyed a different status from other litigants under 28 U.S.C. 2409a(f). *Id.* at 720. However, in the present case it is a sovereign state acting in its sovereign capacity which is seeking to avoid the limitation of Section 2409a(f). A sovereign state has a fundamentally different status than a county which is not a sovereign but is merely a creature of a state having a status much like a corporation. As such, counties do not possess the same privileges and immunities as sovereign states. See, e.g., *Quern v. Jordan,* 440 U.S. 332 (1979); *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978); *Edelman v. Jordan,* 415 U.S. 651 (1974).

Also, *Park County* was a suit by a county claiming a road easement within the boundaries of a national forest, not a suit to quiet title to sovereign public trust lands. Therefore, it is clear

that the State of North Dakota, unlike Park County, enjoys a status different from other litigants under section 2409a(f) when it acts as a sovereign seeking to protect its title to public trust lands. The Eighth Circuit did not reject the holding in Park County, but merely distinguished it from this case based on the fundamentally different lands and plaintiffs involved. Petition, App. A, p. 9a.

3. **The Relative Importance Of The Eighth Circuit Decision Is Limited Since It Only Addresses The Question Of Whether The Quiet Title Act Statute Of Limitations, Section 2409a(f), Bars A State's Action To Quiet Title To Its Sovereign Public Trust Lands In A Suit Against The United States.**

The petitioners (federal defendants) argue that this question is important since "actions by states to quiet title against the United States occur with reasonable frequency." Petition, p. 12. The petitioners cite three recent cases in support of this proposition; *California v. Arizona, supra, Nevada v. United States,* 628 F.2d 1357 (9th Cir. 1980) (table), *cert. denied,* 450 U.S. 995 (1981), and the present case.

First of all, in *California v. Arizona, supra,* other than reprinting the statute in a footnote, no mention whatsoever is made of section 2409a(f). The statute of limitations was not involved in the issue at all.

As to *Nevada v. United States, supra,* the decision is unpublished and therefore its value as authority for any proposition of law is questionable. The *Nevada* decision came out of the Ninth Circuit where, under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit, a decision "which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders . . . ." Therefore, the Nevada decision has no precedential value in the Ninth Circuit. The Eighth Circuit also

disclaims any precedential value in unpublished opinions. See Petitioners' App. A, p. 9a.

Even if *Nevada* had any value as authority, the case is inapposite since the United States claimed the land in question as Indian land. The Quiet Title Act specifically excepts "trust or restricted Indian lands' from the waiver of sovereign immunity. 28 U.S.C. 2409a(a). In *Nevada,* the suit was dismissed on this basis. As an alternative ground the court of appeals stated that the suit was also barred by the twelve year statute of limitations. However, this was mere dicta since the State of Nevada did not challenge the applicability of section 2409a(f) to its claim.

Therefore, of the three recent cases cited by the federal defendants, only in the present case was the applicability of the statute of limitations a major issue that was actually litigated. And only this case concerns a state, acting in its sovereign capacity to protect public trust lands, and the federal government, acting in a proprietary capacity. In other words, this case clearly does not have the sweeping effect on sovereign immunity that the petitioners suggest.

The petitioners also cite pending actions in Puerto Rico and Guam. Petition, p. 13. These cases do not concern sovereigns and sovereign public trust lands since Puerto Rico and Guam are territories, not sovereign states. Hence, these two cases are irrelevant to the issue in the present case.

Finally, the petitioners cite pending actions that involve the statute of limitations defense. Petition, p. 12-13. The fact that several pending actions involve the section 2409a(f) defense of statute of limitations does not, of itself, show that the issue in this case is of general importance nor that a conflict exists of sufficient magnitude to warrant review of the court of appeals decision by this Court. Simply because such cases are pending, in no way buttresses any argument that a square and irreconcilable conflict among the courts exist since these cases have not

yet been decided.[24] Even if some semblence of conflict would appear to exist between the present decision and other decisions cited by the petitioners, certiorari should still be denied. Mr. Justice Harlan once stated that "even where a 'true' conflict may be said to exist, *certiorari* will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals [sic]."[23] Even though the State in no way agrees that a conflict exists in the present situation, it does believe that the future resolution principle is applicable. One of the pending cases cited by the petitioners is *Utah v. United States,* Civil No. C-79-0302 (D. Utah, filed May 22, 1979). Petition, p. 13. *Utah* involves a factual situation and issues almost identical to the present suit. In *Utah,* the State of Utah is seeking to quiet title to a lake bed in an action against the United States. The State of Utah has asserted federal

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[24] The State recognizes that under Rule 17.1(a) of this Court, conflicts of decisions among the courts of appeal is one factor considered by this Court in determining whether to grant certiorari. See Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 237 (1964). However, as discussed under part 2 above, this Eighth Circuit decision does not conflict with other Supreme Court or court of appeals decisions relating to statute of limitations defenses against sovereigns. Moreover, in one of the pending cases cited by the federal defendants, *State of California ex rel. State Lands Commission v. United States,* 512 F. Supp. 36 (N.D. Cal. 1981), a motion to strike the section 2409a(f) defense raised by the United States was granted by the district court. Therefore, the Eighth Circuit is in agreement with a federal district court in California, which is in the Ninth Circuit. This district court also distinguishes *Park County* on the grounds that *Park County* did not involve a sovereign state seeking to quiet title in public trust lands. The district court specifically noted that in its *Park County* opinion "the [Ninth Circuit] court only addressed the applicability of the statute to the counties, and never returned to discuss the possibility that the statute applied to a state." 512 F.Supp. at 45, n. 1.

[23] Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Australian L.J. 108, 112 (1959).

jurisdiction on several grounds as has North Dakota in the present action, including 28 U.S.C. 2409a and 28 U.S.C. 1331. Should *Utah* reach the Tenth Circuit Court of Appeals, that court will surely be required to rule on either the asserted jurisdictional grounds, or the application of section 2409a(f) (statute of limitations), or both. At that time, should the Ninth Circuit hold that *Park County* rather than the present Eighth Circuit decision is controlling, a conflict among the circuits would arise which would certainly be an appropriate basis for granting certiorari. However, granting certiorari at this time would be premature and improper since no true conflict presently exists among the circuits.

## CONCLUSION

The court of appeals narrow holding in the decision below that the statute of limitations (section 2409a(f) of the Quiet Title Act) does not apply to an action by a state acting in its sovereign capacity to protect its sovereign public trust lands is correct.

Furthermore, no conflict exists at this time between the present decision and decisions of this Court or the other circuits.[26]

Finally, the relative importance of this decision is limited since it does not hold that all state actions are exempt from statute of limitation defenses as the petitioners suggest. Rather, this decision applies only to a state acting in its sovereign capacity seeking to protect title to its public trust lands. Also, the State still believes that its original assertion of jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1361, 28 U.S.C. 2201-202, and 5 U.S.C. 701-706 was proper and correct. See Respondent's cross-petition. Therefore, the importance of this decision is minimal because, even if section 2409a(f) were held applicable to states, North Dakota is not barred from its action since jurisdiction exists under other statutory waivers of federal sovereign immunity.

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[26] The State suggests that a more appropriate time for this Court to review the application of section 2409a(f) to states would be after the actions in *People of the State of California v. United States, supra,* and *Utah v. United States, supra,* have reached final disposition in the court below. Only in the event that either the Ninth Circuit in *California,* (should the pending district court decision be appealed) or the Tenth Circuit in *Utah* finds section 2409a(f) applicable to the states, will a true conflict among the circuits exist. At the present time, however, there exists no "square and irreconcilable conflict" sufficient to justify review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.[17]

Respectfully submitted,

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July, 1982

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[17] In the event that this Court should rule that a writ of certiorari should be issued and that the decision below be reversed, the state respectfully requests that the suit be remanded for further proceedings. The state wishes an opportunity to show that, in any case, the statute of limitation had not run at the time the state initiated suit since the state had no notice of the federal government's alleged interest in the public trust lands until shortly before suit was brought by the state.